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NOTE AND COMMENT

THE MORTGAGES IN POSSESSION IN NEW YORK AND IN MICHIGAN.—It is interesting to observe how tenaciously the old common law of mortgages has persisted in the state of New York, the very cradle of the modern lien theory of the mortgage. As early as 1802 Chancellor KENT began the importation into that state of Lord MANSFIELD'S Civil Law doctrines of mortgage. *Johnson* v. *Hart*, 3 Johns. Cas. 322. In 1814, in the case of *Runyan* v. *Mersereau*, 11 Johns. 534, the lien theory definitely triumphed over the old law. In other cases, both before and since the statute of 1828 denying ejectment to the mortgagee, the details of mortgage law were worked over to harmonize with the central theory.

Yet at all times there was a discordant element in the cases dealing with the mortgagee in possession. This became most obvious in the case of *Phyfe* v. *Riley*, 15 Wend. 248, decided by the Supreme Court in 1836. It was there held that to an action of ejectment it was a complete defense to show that defendant was an assignee of a mortgage past due. Three distinct arguments are advanced in the opinion: one of policy, that litigation and expense are saved by permitting the mortgagee in possession to retain possession until redeemed, instead of allowing him to be turned out by an action of ejectment and so putting him to an action of foreclosure; an argument as to the technical nature of a mortgage, that the mortgagee "is still considered as having the

legal estate after condition broken"; and lastly the argument from authority, with citation of earlier New York cases upon the mortgagee's right of possession. The argument of policy leaves us at best upon debatable ground. The argument that the mortgagee had a legal title after default was out of harmony with the later cases. And the argument from the authorities was an appeal to decisions which were subject to reconsideration in the light of the admittedly revolutionary theory of the mortgage at this time prevailing. We may accept the ruling that the statute denying ejectment did not necessarily alter the substantive rights of the mortgagee, for there are several instances in which our law recognizes a right although there is no direct action available for its enforcement, *e. g.,* in the case of contracts unenforceable under the Statute of Frauds or the Statute of Limitations. The difficulty was that there had been a judicial amendment of the law of mortgages, which made the recognition of a right of possession in the mortgagee an anachronism. This doctrine, however, found favor in the courts of New York (and elsewhere, of course, but that is another story) so that by 1875 the anomaly was imbedded in a dozen or more decisions and dicta.

In *Phyfe* v. *Riley* we are not told how the defendant got into possession, and the only indication that the court attached any importance to that matter lies in the observation that "if the mortgagee, after forfeiture, obtains possession *in some legal mode,*" there is no reason for depriving him of it. "Legal mode" was, of course, a question-begging expression, but it is quite clear that it was not intended to limit the mortgagee to an entry under circumstances, such as consent of the owner, which would legalize an entry by an entire stranger. At the same time, obvious considerations of public policy prohibited the legalization of an entry by force, perhaps by fraud as well. Thus the state of the law was fairly summed up by DENIO, J., in *Pell* v. *Ulmar,* 18 N. Y. 139, in the dictum that, "if the mortgagee obtains possession *without force* he is entitled" to hold it. Perhaps the most important application of this doctrine was to the case of one who took possession under a defective foreclosure. Thus in *Fox* v. *Lipe,* 24 Wend. 164, where ejectment was brought against a mortgagee who had entered under a statutory foreclosure, it was held to be unnecessary to decide whether the foreclosure was valid or void. And in *Townshend* v. *Thomson,* 139 N. Y. 152, it was said, "A purchaser at a mortgage foreclosure sale, defective and void as against the owner of the equity of redemption because he was not made a party to the foreclosure action, becomes a mortgagee in possession."

The last citation brings us down to 1893. In the meantime, however, a counter tendency had begun to show itself. In the case of *Howell* v. *Leavitt,* 95 N. Y. 617, decided by the Court of Appeals in 1884, a mortgagee foreclosed by action without making the owners of the equity of redemption parties, purchased on the foreclosure sale, and, with the aid of a writ of assistance, put out the party in possession, who was a tenant of the owners of the equity, and so got into possession. The owners of the equity brought ejectment and were successful. Emphasis was put upon the forcible method of gaining possession, but Justice FINCH, with characteristic force, showed the true nature of the previously accepted doctrine of the mortgagee in possession as

an isolated survival of an outworn creed. This case was followed, in 1908, by *Barson* v. *Mulligan,* 191 N. Y. 306, in which it was held that one who went into possession as lessee of a life tenant was not, by the purchase of an outstanding mortgage, entitled to retain the possession after the death of the life tenant, without the consent of the then owners. Emphasis was put upon the defendant's covenant to surrender possession at the termination of the lease and upon the fact that she never asserted any right of possession under the mortgage, but the court again criticized adversely the old doctrine of the mortgagee in possession.

The old doctrine was certainly shaken, but it was still possible to argue that it remained the law of New York. The two cases last considered might, upon their facts, stand with it in perfect harmony. The former was within the long recognized exception as to possession forcibly obtained; the latter might be regarded as a case of possession fraudulently obtained and be classed with *Russell* v. *Ely,* 2 Black (U. S.) 575, where the leasehold was in a third person who, without the consent of his lessor, delivered possession to the mortgagee after the expiration of his lease.

But a further blow has now been struck at the old doctrine. In the case of *Hermann* v. *Cabinet Land Co.,* 217 N. Y. 526, 112 N. E. 476, decided by the Court of Appeals in April, 1916, the facts were like those of *Howell* v. *Leavitt,* supra, except that the purchaser at the foreclosure sale appeared to have taken possession without the use of force, so that the case came squarely within the older authorities. The court, however, declined to distinguish the case from that of *Howell* v. *Leavitt,* disposed of *Townshend* v. *Thomson* by resting it upon acquiescence of the owner, again condemned the doctrine of the older cases, and declared that in order to establish the rights of a mortgagee in possession, one must show entry *with the consent of the owner,* or "otherwise lawful," the latter expression now clearly meaning, in the light of all that is said in this case and that of *Barson* v. *Mulligan,* an entry which would be lawful without aid of the mortgage, for "it is plain that the mortgagee has no means of getting possession that a stranger has not." (*Barson* v. *Mulligan.*) The New York courts have arrived at last at the logical position which the Supreme Court of Michigan took when first presented with this problem forty years ago. *Newton* v. *McKay,* 30 Mich. 380.

The lien theory of the mortgage might now seem to have completely triumphed in New York, and the problem of the mortgagee in possession to have been finally solved. It is submitted, however, that some ground remains to be cleared. It is the theory of the latest cases that the mortgagee has, by virtue of his mortgage alone, no greater right to enter than a stranger—he may enter only with the consent of the owner, or under other circumstances (if any there be) which would authorize entry by a stranger. But suppose he enters with the consent of the owner, what is his right then? If his mortgage gave him no more right to enter than a stranger's, does his mortgage give his entry with the consent of the owner any greater effect than a similar entry by the stranger? If not, is he more than a tenant at will? The Supreme Court of Michigan has never gone further than to say that he cannot be turned out without notice. *Byers* v. *Byers,* 65 Mich. 598. The Court of Ap-

peals of New York has held, as late as the case of *Townshend* v. *Thomson,* (now interpreted as resting on acquiescence,) that the mortgagee in possession can defend his possession until his mortgage is paid. That case has not as yet been questioned as to this point, but it will be sooner or later and the courts will have to decide whether they will follow the logic of the lien theory further, or cling to this fragment of the older law.

E. N. D.

DOWER IN AN ESTATE IN FEE SUBJECT TO AN EXECUTORY DEVISE.—For the first time the question whether a wife has dower in an estate held by her husband in fee subject to an executory devise has arisen in Rhode Island. *Sheffield* v. *Cooke,* 98 Atl. 161. One J. J. C., seised in fee, devised lands to his son, H. W. C., his heirs and assigns forever, "if, however, * * * my younger daughter A. E. C. survive my said son and his descendants," then all lands over to X. H. W. C. married, had two children who are living, and died, his wife A. H. R. C. surviving. A. E. C. is still alive and H. W. C.'s wife is claiming dower. While it is evident that since H. W. C.'s descendants are still living the contingency on the happening of which the fee in H. W. C. would be terminated has not occurred, yet as it was necessary for the court to decide whether any dower set off to A. H. R. C. would be terminated if the executory limitation should take effect, the question was squarely raised. The court decided it in accordance with the weight of authority, that the happening of the contingency and the limitation of the estate of the husband over to X would have no effect on the dower rights of the wife.

It might be thought that because dower and curtesy are at least dependent upon an estate in the husband or wife, as the case may be—if they are not even incidents of that estate—that any termination of such estate would destroy or terminate the dower or curtesy. But a long time ago some decisions were made which are hard to explain other than as exceptions to the above seemingly logical statement. By these decisions it was settled that curtesy or dower persists in a fee simple estate which has escheated for want of heirs, or in a fee tail estate which has reverted to the grantor because of failure of the specified sort of heirs. *Paine's Case* (*Samnes* v. *Paine*), 8 Coke 34a, 77 Eng. Rep. 524; 2 COKE, LITTLETON, (Butler and Hargrave's edition), 241a, note. Why these cases were decided as they were is rather hard to say. Reasons have been given, such as COKE'S "for that it is *tacite* implied in the gift." But, as BRIGHT queries, if the estate itself has been defeated by the death of the holder without heirs why should a mere incident of that estate, a something attached to it *tacite,* by implication, survive? Probably because the early judges desired to protect dower and curtesy, and after having done so, sought to explain their action by principles "rather to be guessed at than demonstrated." 2 BRIGHT, HUSBAND & WIFE, 467.

However if the estate granted to the husband was subject to a condition subsequent, for breach of which the grantor entered, then by legal legerdemain the grantee's estate was considered as void *ab initio* and, of course, the dower attached to such estate perished. PARK, DOWER, 70; 4 KENT, COMM. (12th ed.) 49.